Supreme Court, U.S.
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No. 87-1190

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

CURT T. SCHNEIDER
GLENN E. CASEBEER II
Schneider & Casebeer
215 West Eighth Street
Coffeyville, Kansas 67337
(316) 251-6530
Counsel for Respondents

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 12, 1988
CERTIORARI GRANTED FEBRUARY 29, 1988

808

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JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-2558

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAY C. BROCE, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS	Filed
1983		
Dec. 1	Case docketed	
Dec. 13	Record on appeal filed, Vol. I (pleadings) (135 pp.), Vol. II (pleadings) (328 pp.), Originals (463 tpp.)	
Dec. 27	Appellant's motion for stay pending appeal filed, original and 3cc, c/s	
	Appellant's motion for stay pending appeal submitted to panel	
Dec. 29	Granted appellant's motion for stay pending appeal disposed of by McWilliams, Barrett, Doyle	
1984		
Feb. 27	Appellant's brief filed, orig & 9cc,c/s	
Apr. 11	Appellee's brief filed, orig. & 10cc,c/s	

DATE	FILINGS – PROCEEDINGS	Filed
May 4	Appellant's reply brief filed, orig & 8cc,c/s (briefs for 83-2559 filed in 83-2558)	
Sept. 12	Case argued and submitted – Seth, Doyle, Bohanon	
Dec. 26	Appellant's motion for stay of district court order filed, orig and 3cc, c/s	
	Appellant's motion for stay submitted to panel	
Dec. 28	Order granting appellant's motion for stay pending appeal Seth, Doyle and Bohanon (parties notified by mail)	
1985		
Jan. 9	Published, signed opinion filed – Seth, Doyle, Bohanon. Writing Judge is Bohanon. (parties served by mail)	
	Judgment is vacated.	
Jan. 16	Published, dissenting opinion filed by Seth. (parties served by mail)	
Feb. 22	Appellee's petition for rehearing, with suggestion for rehearing in banc, filed, orig + 12cc., c/s, and submitted to panel.	
May 23	Appellee's petition for rehearing and suggestion for rehearing in banc is granted – Holloway, Seth, Barrett, Doyle, McKay, Logan, Seymour (parties served by mail) Bohanon	
	Judgment of 1/9/85 is vacated – in banc panel. (parties served by mail)	
Aug. 8	Case argued and submitted – en banc panel + Doyle	

DATE	FILINGS – PROCEEDINGS	Filed
1986		
Jan. 2	Published, signed opinion filed – Holloway, Barrett, Doyle, McKay, Logan, Seymour, Moore. Writing Judge is Moore.	
	Judgment is reversed. Cause remanded.	
	Published, concurring opinion filed by McKay. (parties served by mail)	
	Published, concurring opinion filed – Seymour. (parties served by mail)	
	Published, dissenting opinion filed – Seymour. (parties served by mail)	
	Published, dissenting opinion filed – Barrett. (parties served by mail)	
	Published, dissenting opinion filed – Doyle. (parties served by mail)	
Feb. 14	Mandate issued to district court	
Aug. 11	Record on appeal returned to district court (Vol I-II)	

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-2559

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BROCE CONSTRUCTION CO., INC., DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS	Filed
1983		
Dec. 1	Case docketed	
Dec. 13	Record on appeal filed, Vol. I (pleadings) (135 -pp.), Vol. II (pleadings) (328 pp.), Originals (463 tpp.)	
Dec. 27	Appellant's motion for stay pending appeal filed, original and 3cc, c/s	
	Appellant's motion for stay pending appeal submitted to panel	
Dec. 29	Granted appellant's motion for stay pending appeal disposed of by McWilliams, Barrett, Doyle	
1984		
Feb. 27	Appellant's brief filed, orig & 9cc,c/s	
Apr. 11	Appellee's brief filed, orig. & 10cc,c/s	
May 4	Appellant's reply brief filed, orig & 8cc,c/s (briefs filed in 83-2558)	

DATE	FILINGS – PROCEEDINGS	Filed
Sept. 12	Case argued and submitted – Seth, Doyle, Bohanon	
Dec. 26	Appellant's motion for stay of district court order filed, orig and 3cc, c/s	
	Appellant's motion for stay submitted to panel	
Dec. 28	Order granting appellant's for stay pending appeal Seth, Doyle and Bohanon (parties notified by mail)	
1985		
Jan. 9	Published, signed opinion filed – Seth, Doyle, Bohanon. Writing Judge is Bohanon. (parties served by mail)	
	Appeal dismissed.	
	Mandate issued to district court.	
Jan. 16	Published, dissenting opinion filed by Seth. (parties served by mail)	
Feb. 22	Appellee's petition for rehearing, with suggestion for rehearing in banc, filed, orig + 12cc., c/s, and submitted to panel.	
May 23	Appellee's petition for rehearing and suggestion for rehearing in banc is granted – Holloway, Seth, Barrett, Doyle, McKay, Logan, Seymour (parties served by mail) Bohanon	
	Order mandate issued 1/9/85 recalled – in banc panel. (parties, district court served by mail)	
	Judgment of 1/9/85 is vacated – in banc panel. (parties served by mail)	
May 30	Mandate returned from district court.	

DATE	FILINGS – PROCEEDINGS	Filed
Aug. 8	Case argued and submitted – en banc + Doyle	
Jan. 2	Published, signed opinion filed – Holloway, Doyle, Barrett, McKay, Logan, Seymour, Moore. Writing Judge is Moore. (parties served by mail)	
	Case dismissed.	
	Mandate issued to district court.	
	Published, concurring opinion filed – McKay. (parties served by mail)	
	Published, concurring opinion filed – Seymour. (parties served by mail)	
	Published, dissenting opinion filed – Seymour. (parties served by mail)	
	Published, dissenting opinion filed – Barrett. (parties served by mail)	
	Published, dissenting opinion filed – Doyle. (parties served by mail)	
Aug. 11	Record on appeal returned to district court (Vol I-II)	

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-2166

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

RAY C. BROCE, DEFENDANT-APPELLEE,
BROCE CONSTRUCTION COMPANY, INC.,
DEFENDANT-APPELLEE,
GERALD R. GUMM, DEFENDANT

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS	Filed
1986		
Aug. 7	Criminal case docketed.	(mt)
	Preliminary record on appeal filed.	(mt)
Aug. 12	Amended notice of appeal filed.	(mt)
1987		
Jan. 20	Appellant's brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y	(jg)
Feb. 5	Appellee's brief filed by Ray C. Broce & Broce Construction in 86-2166 & in 86-2202. Original and 12 copies. c/s: y	(jg)
Mar. 3	Appellant's reply brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y	(mt)

DATE	FILINGS – PROCEEDINGS	Filed
Mar. 16	Record on appeal filed: Volumes I-II (Pleadings), Copies; Volume III (Grand Jury Transcripts), ORIGINAL – SEALED; Volume IV (Presentence Reports), ORIGINAL – SEALED; Volume IV (Presentence Reports), ORIGINAL – SEALED; Volumes V-VII (Transcripts) (549 pp), Copies.	(jg)
May 19	Case argued and submitted to Judges Logan, Barrett, Timbers.	(dvc)
Aug. 18	Order and judgment filed by Logan, authoring judge, Barrett, panel member, Timbers, panel member, judgment affirmed.	(sys)
Sept. 8	Petition for rehearing en banc filed by USA in 86-2166. Original and 11 copies. c/s: y	(sys)
Sept. 9	Petition for rehearing en banc filed by Appellant USA submitted to panel.	(sys)
Nov. 13	Order filed by EN BANC panel denying Petition for rehearing en banc. Judge Tacha did not participate in consideration of the suggestion for rehearing en banc. in 86-2202, denying Petition for rehearing en banc in 86-2202	(lwb)
Nov. 23	Mandate issued to the district court.	(mt)
1988		
Jan. 28	Petition for writ of certiorari filed on 1/12/88 by Appellant USA in 86-2166, Appellant USA in 86-2202.	(lwb)
Mar. 8	Supreme Court order dated 2/29/88 granting certiorari filed.	(mt)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-2202

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

RAY C. BROCE, DEFENDANT-APPELLEE,
BROCE CONSTRUCTION COMPANY, INC.,
DEFENDANT-APPELLEE,
GERALD R. GUMM, DEFENDANT

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS	Filed
1986		
Aug. 13	Criminal case docketed.	(mt)
	Preliminary record on appeal filed.	(mt)
1987		
Jan. 20	Appellant's brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y	(jg)
Feb. 5	Appellee's brief filed by Ray C. Broce & Broce Construction in 86-2166 & in 86-2202. Original and 12 copies. c/s: y	(jg)
Mar. 3	Appellant's reply brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y	(mt)
Mar. 16	Record on appeal filed: Volumes I-II (Pleadings), Copies; Volume III (Grand Jury Transcripts), ORIGINAL – SEALED;	

DATE	FILINGS–PROCEEDINGS	Filed
	Volume IV (Presentence Reports), ORIGINAL–SEALED; Volumes V-VII (Transcripts) (549 pp), Copies.	(jg)
May 19	Case argued and submitted to Judges Logan, Barrett, Timbers.	(dvc)
Aug. 18	Order and judgment filed by Logan, authoring judge, Barrett, panel member, Timbers, panel member, judgment affirmed.	(sys)
Sept. 8	Petition for rehearing en banc filed by USA in 86-2202. Original and 11 copies. c/s: y	(sys)
Sept. 9	Petition for rehearing en banc filed by Appellant USA submitted to panel.	(sys)
Nov. 13	Order filed by EN BANC panel denying Petition for rehearing en banc. Judge Tacha did not participate in consideration of the suggestion for rehearing en banc. in 86-2202, denying Petition for rehearing en banc in 86-2202	(lwb)
Nov. 23	Mandate issued to the district court.	(mt)
1988		
Jan. 28	Petition for writ of certiorari filed on 1/12/88 by Appellant USA in 86-2166, Appellant USA in 86-2202.	(lwb)
Mar. 8	Supreme Court order dated 2/29/88 granting certiorari filed.	(mt)

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Criminal Action No. 81-20119-01

UNITED STATES OF AMERICA

v.

BROCE CONSTRUCTION CO., INC., RAY C. BROCE, AND GERALD R. GUMM, DEFENDANTS

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1981		
Nov. 17	1	INDICTMENT
Nov. 23	9	RULE 5 HEARING at KC-MAG. JMS: Deft. BROCE CONSTRUCTION CO. Omni/Arr set 11-23-81 at 9:30 A.M.
Nov. 23	11	ARRAIGNMENT/PLEA at KC-MAG. JMS: Deft. BROCE CONSTRUCTION CO., N/G, Ct. #1 and #2, Motions-12-8-81, Response–12-18-81–Hearing on Motions–12-21-81 at 10:30 A.M.
Nov. 23	12	RULE 5 HEARING at KC-MAG. JMS: Deft. RAY C. BROCE, Conditions of Release, Bail Release Order, APPEARANCE BOND: 6711 E. Morlick Road, Phoenix, Arizona Omni/Arr set 11-23-81 at 9:30 A.M.

DATE	NR	PROCEEDINGS
Nov. 23	14	ARRAIGNMENT/PLEA at KC-MAG. JMS: Deft. RAY C. BROCE, N/G, Ct. #1 and #2, Motions-12-8-81, Response-12-18-81, Hearing on Motions-12-21-81 at 10:30 A.M.
Dec. 08	21	MOTION of Defts' for Bill of Particulars
Dec. 18	33	Gov't Voluntary Bill of Particulars in Response to Defts. Mtn.
1982		
Jan. 15	39	ORDER ENTERED-EEO: Trial set for 2-8-82 at 9:30 A.M. before Judge O'Connor in Topeka, Kansas.
Feb. 08	44	Plea Agreement between United States of America and Deft. Broce Construction Co., Inc.
Feb. 08	45	PETITION and ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION CO. to enter Plea of Guilty
Feb. 08	46	CHANGE OF PLEA AT KC-EEO: DEFT. BROCE CONSTRUCTION CO. INC. Guilty, Ct. #1 (Accepted), N/G, Ct. #2, Judgment Deferred, P/S/I pending. Sentencing set for 3-15-82 at 10:30 A.M. Ct. #2 to be dismissed on Motion of U.S. Attorney at time of sentence.
Feb. 08	47	Plea Agreement between United States of America and Deft. Ray C. Broce

DATE	NR	PROCEEDINGS
		(Statement of Facts in Support of Pleas attached)
Feb. 08	48	PETITION and ORDER ENTERED-EEO: Deft. RAY C. BROCE to enter plea of guilty
Feb. 08	49	CHANGE OF PLEA AT KC-EEO: Deft. RAY C. BROCE Guilty, Ct. #1 and #2 (Accepted), Judgment Deferred, P/S/I pending. Sentencing set for 3-15-82 at 10:30 A.M.
Mar. 15	55	SENTENCE at KC-EEO: Deft. BROCE CONSTRUCTION CO. Ct. #1, Fined $750,000. One Third of fine to be paid by 12-31-82; one third of fine to be paid by 12-31-83 and one third of fine to be paid by 12-31-84. Ct. #2—Dismissed on motion of U.S. Attorney.
Mar. 15	56	SENTENCE at KC-EEO: Deft. RAY C. BROCE, Ct. #1, 2yrs. impr., Ct. #2, 2 yrs. impr. to run conc. with Ct. #1. Elig. for parole pur. 18:4205(b)(2) and fined $50,000 on Ct. #1 and $1,000 on Ct. #2 with total fine of $51,000. Deft. fine to be paid in full prior to Deft's release from incarceration. Ct. rec. sent. be served at a minimum security institution and deft. will be permitted to surrender directly to designated institution. Deft. will be granted a stay to 3-29-82

DATE	NR	PROCEEDINGS
		and deft. is directed to surrender during business hours on that date. Ct. recommends that Deft. be confined at Federal Pirson Camp at Big Spring, Texas or if they are full that confinement be at FCI at Ft Worth, Texas. All sent. are to run conc., both in this case and as to the sentence imposed in 82-20011-01.
Mar. 16	58	JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION CO., Ct. #1, Fined: $750,000. One-third of fine to be paid by 12-31-82; the next one-third to be paid by 12-31-83 and remaining one-third by 12-31-84. Ct. #2—dismissed on mtn. of U.S. Attorney.
Mar. 17	60	JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. RAY C. BROCE. Ct. #1, 2 yrs. impr. elig. for parole pur. 18:4205(b)(2) and fined $50,000. Ct. #2, 2 yrs. impr. elig. for parole pur. 18:4205(b)(2) and fined $1,000. Sent. of impr. on Ct. #2 to run conc. with Ct. #1. Fines imposed are to be paid prior to defts. release from prison as they are committed fines. Exec. of sent. stayed to 5-3-82 on which date deft. to surrender to designated in-

DATE	NR	PROCEEDINGS
		stitution. Ct. rec. period of incarceration be served at a minimum security institution; preferably at Big Spring, Texas and if that is unavailable, Forth Worth, Texas.
Jun. 07	68	Return of USM on J/C. Deft. BROCE surrendered 5-3-82 to Federal Correctional Inst. Fort Worth, Texas.
Jun. 11	70	Satisfaction of Fine of Deft. RAY C. BROCE
1983		
Feb. 22	82	MOTION of Defendants To Vacate Sentence pur. to Rule 35(a)
Mar. 21	85	Gov't RESPONSE to Defts' Motion to Vacate Sentence Pur. to Rule 35(a)
Mar. 28	86	Defts' REPLY to Gov't Response to Motion to Vacate Sentence Pur. Rule 35(a). Affidavits attached.
Mar. 30	87	Stipulation of Parties that the Court may consider Record made at Evidentiary Hearing in USA v. Beachner 82-20076-01
May 03	88	at KC-EEO: Deft's Motion to Vacate Sentence Pur. to Rule 35(a)—U/A. Gov'ts oral motion to augment the evidence introduced in the evidentiary hearing before Judge Saffels by introducing the 4-6-81 Grand Jury Testimony of Michael Paul Gallagher; the 2-3-81 Grand Jury

DATE	NR	PROCEEDINGS
		testimony of Bernard Carlile; the 2-3-81 Grand Jury testimony of James A. Carlile and the 2-16-82 Grand Jury Testimony of Orville Spray Jr.—Granted and Mr. Eisenbrandt will be permitted to submit whatever additional Grand Jury transcripts he wants to submit for court's consideration. Deft's oral motion to make the presentence report a part of the record in this hearing—Gov't will be given to 5-6-83 to respond to Deft's Motion and Gov't is directed to inform Deft's of their position no later than 5-6-83. Submitted Grand Jury transcripts are to be sealed and not opened unless the court so directs.
Nov. 18	90	MEMORANDUM AND ORDER ENTERED-EEO: Defts' Mtn. to Vacate—Denied
Nov. 28	91	NOTICE OF APPEAL BY Deft. RAY C. BROCE & BROCE CONST. $70.00 paid.
1984		
Jan. 03	98	ORDER ENTERED-HOWARD K. PHILLIPS-10th CIRCUIT COURT OF APPEALS: Defts. contend that only one fine could be properly assessed and in order to avoid claim of acquiescing to Dist. Ct. this court

DATE	NR	PROCEEDINGS
		should allow $250,000.00 to be paid on or before 12-31-83 and allow a bond posted by 12-31-83 in the sum of $250,000.00 guaranteeing payment of that amount. Mtn. to stay payment of one half of the fine due to be paid on or before 12-31-83, in cases 81-20119-01 and 82-20011-01, is granted pending disposition of captioned appeals, on condition that the defts. post a good and sufficient bond in the sum of $250,000 on or before 12-31-83 in KCK—Office of Clerk, pending disposition on appeal.
Jan. 04	99	ORDER ENTERED-EEO: $250,000 has been paid in 81-20119-01. A good and sufficient bond has been posted—Certificate of Deposit in the amount of $250,000 has been placed with Clerk payable to Clerk of District Court in 82-20011-01 until disposition of appeal. CD will serve as bond in 82-20011-01.
1985		
Jan. 02	100	ORDER ENTERED-HOWARD K. PHILLIPS, CLERK-10th CIRCUIT COURT of APPEALS: Mtn. for stay pending appeal is granted, on the condition that appellants post agood and sufficient bond in the

DATE	NR	PROCEEDINGS
		sum of $500,000 on or before 12-31-84, in the Kansas City office of the Clerk of the U.S. District Court for the District of Kansas, pending disposition of this appeal.
Jan. 08	101	ORDER ENTERED—EEO: $750,000 has been paid in 81-20119-01 & 82-2011-01; Certificate of Deposit in amount of $250,000 has been placed with clerk of District Court in 81-20119-01 and 82-20011-01 until disposition of appeal; Certificate of Deposit presently with Clerk in amount of $250,000 in 81-20119-01 and 82-20011-01 has accumulated interest since 12-29-83 and clerk of Court is directed to pay interest to Deft. Broce Const. Co. upon posting of new CD in amount of $250,000.
Jan. 08	102	ORDER ENTERED-EEO: $250,000 credited to 82-20011-02 on 12-31-82 is transferred to Criminal Action 81-20119-01 USA vs. Broce Const. Company. This will satisfy the total fine of $750,000 in 81-20119-01.
Jan. 11	103	OPINION, of U.S. COURT OF APPEALS, 10th Circuit, for Deft. BROCE CONSTRUCTION CO. INC.
Feb. 04	106	Satisfaction of Criminal Fine of Deft. BROCE CONSTRUCTION CO.

DATE	NR	PROCEEDINGS
May 28	107	ORDER ENTERED-HOWARD K. PHILLIPS COURT OF APPEALS—10th CIRCUIT: Appellee's petition for rehearing and suggestion for rehearing in banc is granted. Mandate issued 1-9-85 to U.S. District Court for District of Kansas in 83-2559 is recalled. Judgment entered 1-9-85 is recalled. Judgment entered 1-9-85 is vacated. Defts. Ray C. Broce and Broce Construction Co., Inc.
1986		
Jan. 06	110	OPINION, of U.S. Court of Appeals, 10th Circuit for Deft. BROCE CONSTRUCTION COMPANY.
May 01	114	BRIEF of United States on Remand from the Tenth Circuit Court of Appeals for a Factual Determination with Attachments (UNDER SEAL PER ORDER OF COURT—VAULT)
May 29	117	BRIEF For BROCE CONSTRUCTION COMPANY, INC. et al. on Remand from the Tenth Circuit Court of Appeals for a Factual Determination.
Jun. 30	118	MEMORANDUM AND ORDER ENTERED-EEO: The judgment and sentence entered against Defts.

DATE	NR	PROCEEDINGS
		BROCE CONSTRUCTION CO., INC., and RAY C. BROCE in Case No. 82-20011-01 are vacated. The judgment and sentence entered against both Defts. in Case No. 81-20119-01 shall stand.
Jul. 07	119	ORDER ENTERED-EEO: The Clerk is directed to release the bond in the amount of $750,000.00 to Deft. BROCE CONSTRUCTION CO., INC. in Case No. 82-20011-01. The Clerk is further ordered to return to Deft. RAY BROCE the amount of $50,000.00 that has been previously paid in Case No. 82-20011-01.
Aug. 08	120	AMENDED NOTICE OF APPEAL filed by USA.

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Criminal Action No. 82-20011-01

UNITED STATES OF AMERICA

v.

RAY C. BROCE, BROCE CONSTRUCTION CO., INC., DEFENDANTS

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1982		
Feb. 04	1	INDICTMENT
Feb. 08	5	Plea Agreement between the United States of America and Deft. BROCE CONSTRUCTION CO., INC. (orig. 81-20119-01)
Feb. 08	6	PETITION and ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION to enter plea of guilty – (Orig. filed 81-20119-01)
Feb. 08	7	ARRAIGNMENT/PLEA AT KC-EEO: Deft. BROCE CONSTRUCTION CO. Guilty, Ct. #1 (Accepted), Judgment Deferred, P/S/I pending, Sentencing set 3-15-82 at 10:30 A.M.
Feb. 08	8	Plea Agreement Between the United States of America and Deft. RAY C. BROCE

DATE	NR	PROCEEDINGS
Feb. 08	9	PETITION and ORDER ENTERED-EEO: Deft. RAY C. BROCE to enter plea of guilty (Orig. filed 81-20119-01)
Feb. 08	10	ARRAIGNMENT/PLEA AT KC-EEO: Deft. RAY C. BROCE, Guilty Ct. #1 (Accepted), Judgment deferred, P/S/I pending. Sentencing set 3-15-82 at 10:30 A.M.
Mar. 15	16	SENTENCE At KC-EEO: Deft. RAY C. BROCE, Ct. #1, 2 yrs. impr. and fined $50,000. Sent. imposed in this case to run conc. to sent. imposed in 81-20119-01. Deft. fine to be paid in full prior to Deft's release from incarceration. Ct. rec. that sent. be served at a minimum security institution and deft. will be permitted to surrender directly to designated institution. Deft. will be granted a stay to 3-29-82 and Deft. is directed to surrender during business hours on that date. Ct. recommends that deft. be confined at Federal Prison camp at Big Spring, Texas or if they are full that conf. be at FCI at Ft. Worth, Texas.
Mar. 15	17	SENTENCE at KC-EEO: Deft. BROCE CONSTRUCTION CO. Ct. #1, Fined: $750,000. One third of fine to be paid by 12-31-82; one third of fine to be paid by 12-31-83 and

DATE	NR	PROCEEDINGS
		one third of fine to be paid by 12-31-84.
Mar. 16	18	JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION CO. Ct. #1, Fined $750,000. One-third of fine to be paid by 12-31-82; the next one-third to be paid by 12-31-83; and the remaining one-third of fine paid by 12-31-84.
Mar. 17	19	JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. RAY C. BROCE. Ct. #1, 2 yrs. impr. and fined $50,000. Sent. to run conc. with sent. imposed in 81-20119-01. Fine imposed is to be paid prior to deft's release from prison as it is a committed fine. Exec. of sent. stayed until Monday, 5-3-82, on which date deft. is to surrender to designated institution no later than 2:00 P.M. Ct. rec. period of incarceration be served at a minimum security institution; preferably at Big Spring, Texas and if that is unavailable, Forth Worth, Texas.
Jun. 7	24	Return of USM on J/C. Deft. Broce surrendered 5-3-82 to FCI, Forth Worth, Texas.
Jun. 11	25	Satisfaction of Fine of Deft. RAY C. BROCE

DATE	NR	PROCEEDINGS
1983		
Feb. 22	28	MOTION of Defendants to Vacate Sentence pur. to Rule 35(a)
Mar. 21	31	Gov't Response to Defts' Motion to Vacate Sentence Pur. to Rule 35(a)
Mar. 28	32	Defts' REPLY to Gov't Response to Motion to Vacate Sentence Pursuant to Rule 35(a). Attachments.
Mar. 30	33	Stipulation of the Parties that the Court May consider Record made at Evidentiary Hearing in USA v. Beachner 82-20076-01.
May 3	34	at KC-EEO: Deft's Motion to Vacate Sentence Pur. to Rule 35(a)—U/A. Gov'ts oral motion to augment the evidence introduced in the Evidentiary Hearing before Judge Saffels by introducing the 4-6-81 Grand Jury Testimony of Michael Paul Gallagher; the 2-3-81 Grand Jury testimony of Bernard Carlile; the 2-3-81 Grand Jury Testimony of James A. Carlile and the 2-16-82 Grand Jury Testimony of Orville Spray Jr.—Granted and Mr. Eisenbrandt will be permitted to submit whatever additional Grand Jury transcripts he wants to submit for court's consideration. Deft's oral motion to make the presentence report a part of the record in this hearing—Gov't will be given to 5-6-83 to

DATE	NR	PROCEEDINGS
		respond to Deft's Motion and Gov't is directed to inform Deft's of their position no later than 5-6-83. Submitted Grand Jury transcripts are to be sealed and not opened unless the court so directs.
Nov. 18	35	MEMORANDUM AND ORDER ENTERED-EEO: Defts' Mtn. to Vacate—Denied
Nov. 28	36	NOTICE OF APPEAL by Deft.
Dec. 30		CD No. 210332 in the amount of $250,000.00 placed in vault for 1983 fine payment for Broce Const. Co. pursuant to order of 10th Circuit.
1984		
Jan. 03	43	ORDER ENTERED-HOWARD K. PHILLIPS-10th CIRCUIT COURT OF APPEALS. Defts. contend that only one fine could be properly assessed and in order to avoid claim of acquiescing to Dist. Ct. this court should allow $250,000.00 to be paid on or before 12-31-83 and allow a bond posted by 12-31-83 in the sum of $250,000.00 guaranteeing payment of that amount. Mtn. to stay payment of one half of the fine due to be paid on or before 12-31-83, in cases 81-20119-01 and 82-20011-01, is granted pending disposition of captioned appeals, on condition that

DATE	NR	PROCEEDINGS
		defts. post a good and sufficient bond in the sum of $250,000 on or before 12-31-83 in KCK—Office of Clerk, pending disposition on appeal.
Jan. 04	44	ORDER ENTERED-EEO: $250,000 has been paid in 81-20119-01. A good and sufficient bond has been posted—Certificate of Deposit in the amount of $250,000.00 has been placed with Clerk payable to Clerk of District Court in 82-20011-01 until disposition of appeal. CD will serve as bond in 82-20011-01
1985		
Jan. 02	45	ORDER ENTERED-HOWARD K. PHILLIPS, CLERK—10th Circuit Court of Appeals: Mtn. of stay pending appeal is granted, on the condition that appellants post a good and sufficient bond in the sum of $500,000 on or before 12-31-84, in the Kansas City Office of the Clerk of the U.S. District Court for the District of Kansas, pending disposition of this appeal.
Jan. 02	46	ORDER ENTERED-EEO: Certificate of Deposit in the amount of $500,000 has been placed with the Clerk of the Court and made payable to Clerk of the District Court in 82-20011-02, until the disposition of the appeal in

DATE	NR	PROCEEDINGS
		this case. Certificate of Deposit will serve as a bond in case 82-20011-02 and will remain with the Clerk of the District Court until there is a final determination in this case.
Jan. 08	47	ORDER ENTERED-EEO: $750,000 has been paid in 81-20119-01 and 82-2011-01; Certificate of Deposit in amount of $250,000 has been placed with clerk of District Court in 81-20119-01 and 82-20011-01 until disposition of appeal; Certificate of Deposit presently with Clerk in amount of $250,000 in 81-20119-01 and 82-20011-01 has accumulated interest since 12-29-83 and clerk of Court is directed to pay interest to Deft. Broce Const. Co. upon posting of new CD in amount of $250,000.00.
Jan. 08	48	ORDER ENTERED-EEO: $250,000 credited to 82-20011-02 on 12-31-82 is transferred to Criminal Action 81-20119-01 USA vs. Broce Const. Company. This will satisfy the total fine of $750,000 in 81-20119-01.
1986		
Feb. 18	52	OPINION, of U.S. COURT OF APPEALS, 10th CIRCUIT FOR Deft. RAY BROCE
May 01	56	BRIEF for the United States on Remand from the Tenth Circuit Court

DATE	NR	PROCEEDINGS
		of Appeals for a Factual Determination with Attachments (Sealed Per Order of Court – Vault)
May 29	59	BRIEF for Broce Construction Company, Inc. et al. on Remand From the Tenth Circuit Court of Appeals for a Factual Determination.
Jun. 30	60	MEMORANDUM AND ORDER ENTERED-EEO: The judgment and sentence entered against Defts. BROCE CONSTRUCTION CO., INC., and RAY C. BROCE in Case No. 82-20011-01 are hereby Vacated. The judgment and sentence entered against both Defts. in Case No. 81-20119-01 shall stand.
Jul. 07	61	ORDER ENTERED-EEO: The Clerk is directed to release the bond in the amount of $750,000.00 to Deft. BROCE CONSTRUCTION COMPANY INC. in Case No. 82-20011-01. The Clerk is further ordered to return to Deft. RAY BROCE the amount of $50,000.00 that has been previously paid in Case No. 82-20011-01.
Jul. 30	63	NOTICE OF APPEAL filed by USA.
Aug. 08	64	AMENDED NOTICE OF APPEAL filed by USA.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

BROCE CONSTRUCTION CO., INC.,
RAY C. BROCE AND GERALD R. GUMM, DEFENDANTS

No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO.
DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

February 8, 1982

Appearances:

HON. EARL E. O'CONNOR,
Chief Judge

For the Plaintiff: MR. RICHARD J. BRAUN
and MS. MARY JONES,
U.S. Department of Justice,
Room 2634,
Everett M. Dirksen Building,
Chicago, Illinois 60604.

For the Defendants: MR. ROBERT TILTON
MR. KENNETH F. CROCKETT,
1324 Topeka Boulevard
Topeka, Kansas 66612.

Harold Pittell,
Official Reporter

BE IT REMEMBERED, on the 8th day of February, 1982, the above matter coming on for hearing before the Honorable Earl E. O'Connor, Chief Judge of the United States District Court for the District of Kansas, and the parties appearing in person and/or by counsel, the following proceedings were had:

[3] MR. TILTON: Your Honor, excuse me. Mr. Broce is extremely hard of hearing, and if you could speak up I certainly would appreciate it.

THE COURT: All right.

If the defendant and counsel will come forward, please.

MR. TILTON: If you can't hear the Judge, will you tell him?

DEFENDANT BROCE: Yes.

THE COURT: Now, first of all, as I indicated to counsel by an order that I sent you just the other day, the Court failed to make an inquiry and make a record on the fact that this defendant, as well as the defendant Broce Construction Company, and also the other defendant, Gerald R. Gumm, were all represented by the same attorneys, and under the new Rule 44 of the Federal Rules of Criminal Procedure, Subsection C, it is the duty of the Court to advise each defendant of his right to the effective assistance of counsel, including the right to have a separate attorney, and also advise each defendant that

there might be a possible conflict of interest by having the same attorneys represent all defendants.

Mr. Tilton, have you gone over this rule with the defendants here?

[4] MR. TILTON: Yes, Your Honor, we did. We advised them of how the conflicts might arise and the fact that they might have different opportunities during the course of the case, that their interests might conflict, and they have assured us they understand this, that they want to have a united counsel effort, and we feel that they have been very carefully two or three times advised of their rights and the possibilities that could result in conflicts, and knowing this, they have always indicated to us that they want to waive their right to separate attorneys and have the same attorney represent the corporation and both defendants.

THE COURT: All right. So, Mr. Tilton, then, you know of no good cause why there would be a conflict of interest, then, that either has arisen or would likely arise by virtue of the representation of all defendants by the same attorneys?

MR. TILTON: No. There have been conflicts Your Honor, to the extent maybe an offer of reduced sentence, et cetera, to one. We have always explained this to the defendant that was involved, and I feel that any potential conflict has always been explained to them, they understand it, and they have always indicated they still want us to represent them, and I know of no conflict now that would make it not possible for us to [5] represent them.

THE COURT: Mr. Broce, do you agree with what Mr. Tilton has just said, that you understand that you have a right to the assistance of a separate attorney and that you are willing to waive any right that you might have as to possible conflict of interest by having the same attorney represent both you and the corporation and Mr. Gumm?

DEFENDANT BROCE: Yes, I understand it.

THE COURT: Mr. Gumm, do you agree with what Mr. Tilton has just said, that you do fully understand your right to separate counsel and you waive any right that you might have arising from any possible conflict of interest by having the same counsel represent all of you?

DEFENDANT GUMM: Yes, sir.

THE COURT: Now, this case was set for trial for this morning in Topeka. Now, Mr. Tilton, do you have a matter to present to the Court in the way of a change of plea?

MR. TILTON: Yes, Your Honor. We have entered into a plea bargaining agreement with the federal government, and we have a copy of this agreement here. It entails our pleading to—Mr. Broce, as outlined in the plea agreement, would plead to the [6] Sherman Antitrust violation, a mail fraud violation, and Mr. Gumm would plead to a Sherman Antitrust violation. The corporation would plead to a Sherman Antitrust violation. Then, on Friday, another indictment has been returned against Ray Broce and Broce Construction Co. to which Ray Broce and Broce Construction Co. have agreed to plead to charges of Sherman Antitrust violation. In return for that and our cooperation as outlined in the plea agreement, the government has agreed not to have any further prosecutions of any of these defendants or the Broce Construction Co., Inc., in either Kansas or Nebraska—excuse me, Oklahoma, or any of their subsidiaries or any of their employees or agents, and this is in the form of a written agreement, Your Honor.

THE COURT: All right. Now, let's take up the plea, then, by Mr. Broce personally, and also you are authorized to speak for and on behalf of the Broce Construction Co., is that correct?

MR. TILTON: That's correct. He is president, Your Honor.

THE COURT: Now, as I understand it, then, the plea by Broce Construction Co. is that of guilty to Count 1, which is the Sherman Antitrust violation, is that correct?

MR. TILTON: That's correct, Your Honor.

[7] THE COURT: And that is on behalf of the corporation?

MR. TILTON: That's correct.

THE COURT: Is the corporation pleading guilty, then, to the mail fraud?

MR. TILTON: Yes, Your Honor, yes, I overlooked that, excuse me.

THE COURT: And then Mr. Broce personally is entering a plea of guilty to the—to Count 1, the Sherman Antitrust Violation, is that correct?

MR. TILTON: That's correct.

MR. CROCKETT: And Count 2, also, Your Honor.

THE COURT: And also Count 2, the mail fraud?

MR. BRAUN: Your Honor, I think there may be some misunderstanding. With respect to the corporation, the corporation has—the corporation, as I understand it, pursuant to the plea agreement, is not pleading to the mail fraud count.

THE COURT: Let's get it straight. I don't want you pleading guilty to some—

MR. TILTON: That's correct. The corporation, under our written agreement, we are only pleading to the Sherman Antitrust violation and they [8] will dismiss Count 2.

THE COURT: So the corporation and Mr. Broce are pleading guilty to Count 1 and Mr. Broce personally is pleading guilty to both Count 1 and Count 2?

MR. CROCKETT: That's correct, Your Honor.

THE COURT: Is that right, Mr. Broce?

DEFENDANT BROCE: Right.

THE COURT: Now, Mr. Broce, I'm going to ask you a number of questions here. I think maybe we can take the

plea, if there is going to be a plea on this other case, at the same time and then we will ask the questions that will apply to both cases, and this is case 82-20011-01, and this is the charge, the indictment that was returned February 4 against Ray C. Broce and Broce Construction Co., Inc., and this is one count, and as I understand, now, Mr. Broce on behalf of himself and also the construction company desires to enter a plea of guilty to this one count which is another Sherman Antitrust violation, is that correct?

MR. TILTON: That is 82-20011-02, Your Honor?

THE COURT: 01 and 2, right.

MR. TILTON: That's correct.

THE COURT: Mr. Broce, the Court is going to ask you some questions in regard to these pleas of [9] guilty in both of these cases, and they are being asked of you and you will be answering these questions on behalf of yourself personally and also the corporation. Now, you understand that?

DEFENDANT BROCE: Yes, sir.

THE COURT: Now, you have indicated in case 81-20119-01, and that is the older case of the two, that it is your desire to enter on behalf of yourself guilty pleas to Count 1 and 2, and on behalf of the corporation a guilty plea to Count 1, and also in the new case, which is 82-20011-01, that both you yourself personally and on behalf of the corporation wish to enter a plea of guilty to just the one charge, and that is the only charge in the indictment. Now, is that correct?

DEFENDANT BROCE: Right, correct.

THE COURT: Mr. Broce, although now you indicate your desire to enter pleas of guilty on behalf of yourself and also the corporation, the Court does want to advise you and impress upon you that you do have a right to plead not guilty, both on behalf of yourself and the corporation, and in the event of a not guilty plea, the Con-

stitution does guarantee you certain rights, namely, the right to a speedy and public trial by a jury, and at that trial and at all stages of the proceedings [10] you would have the right to the assistance of a lawyer; you would also have the right to see and hear all witnesses that might be called to testify against you, and the right to cross-examine those witnesses. You would also have the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in your favor, and also so far as you personally are concerned, you would have the right not to be compelled to take the witness stand and testify and possibly incriminate yourself, and if you did choose not to testify, the jury would be instructed that no inference of guilt could be drawn from your failure to do so and, further, then, at any trial your innocence would be presumed until such time, if ever, as the government established your guilt by competent evidence to the satisfaction of the Judge or jury beyond a reasonable doubt.

Now, Mr. Broce, do you understand these rights that are guaranteed to you under the law if you plead not guilty?

DEFENDANT BROCE: I do.

THE COURT: And do you understand that by entering pleas of guilty that you would be waiving or giving up all of these constitutional rights that I have just explained to you?

[11] DEFENDANT BROCE: I do.

THE COURT: And do you further realize that as to these charges where you are entering pleas of guilty that you would be admitting all the facts alleged in these charges and you would be waiving or giving up your right to a trial on the charges? In fact, there would be no further trial of any kind, either to the Court or to a jury, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: And do you understand that even though you are entering these pleas of guilty, that the Court nevertheless could go ahead and render the same type of punishment or the same punishment just as if pleas of not guilty had been entered and you stood trial and been convicted by a jury, do you understand that?

DEFENDANT BROCE: I do, yes, I do.

THE COURT: Now, I want to explain to you what the law provides in the way of maximum punishment for these offenses. As to the Sherman Antitrust violations, so far as the corporation is concerned, the maximum punishment is a fine up to one million dollars on each charge, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: And as to you individually, on the Sherman antitrust violations, the maximum punishment [12] is a fine up to one hundred thousand dollars and a term of imprisonment up to three years on each charge, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: Now, on the mail fraud count, there is a mail fraud count here on one of these charges, I want you to understand that the maximum punishment for that offense is a fine up to one thousand dollars and a term of imprisonment up to five years, do you understand that?

DEFENDANT BROCE: I read that, yes, sir.

THE COURT: Now, as I understand from counsel that these pleas of guilty are the result of plea agreements between the defendants and their attorneys and government counsel, is that correct, Mr. Braun?

MS. JONES: That's correct, Your Honor.

THE COURT: And that is attached to the plea of guilty petition.

MR. TILTON: They haven't been attached but they are here, Judge.

THE COURT: We will go over those in a few minutes.

Mr. Broce, these pleas of guilty, as I understand, are the result of a plea agreement that you have entered into with the government. I do want to ask you, other than what has been stated in these plea agreements, has there been any sort of promise or inducement made to you other than what is stated in those agreements for you to enter these guilty pleas today?

DEFENDANT BROCE: I don't know of any.

MR. TILTON: Your Honor, I would like to say, although this agreement doesn't have it in it because of time constraints, it is agreed between the government and the defendants, and I think they will acknowledge that and I would like that on the record, that there will be no prosecutions of any subsidiaries or agents of the defendant Broce Construction Co. or its subsidiary agents in consideration of these pleas, and that should be a part of the agreement although it is not in the written agreement.

THE COURT: Is this correct, Counsel? Mr. Braun?

MR. BRAUN: Yes. We agree the agreement – Broce's subsidiaries and its officers, agents and directors, when we say in the agreement Broce Construction Co.

THE COURT: Mr. Broce, are you telling the Court that you on behalf of yourself and also on behalf of the coporation are entering these pleas of guilty freely and voluntarily, is that correct?

[14] DEFENDANT BROCE: Correct.

THE COURT: The only reason you are entering these pleas of guilty is because you and the corporation are guilty of these offenses, is that correct?

DEFENDANT BROCE: Correct.

THE COURT: Do you understand that in connection with your plea of guilty that the Court is going to ask some

questions concerning these offenses and your participation in them? You will be answering these questions under oath, on the record and in the presence of your attorney, and these answers, if not correct, could be used against you later in a prosecution for perjury or false statement, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: Now, have you gone over with your attorneys a written petition to enter pleas of guilty in each of these cases?

MR. TILTON: Yes, he has, Your Honor.

DEFENDANT BROCE: Yes.

THE COURT: And do you have any questions at all that you want to raise at this time about any of the matters covered in those written petitions?

DEFENDANT BROCE: No.

THE COURT: And do you understand that the answers that you are making to the questions in those [15] petitions, both by you personally and also on behalf of the corporation, that they are being made here in Court under oath?

DEFENDANT BROCE: Yes.

THE COURT: Now, you may go ahead and sign the petitions if you have not done so and then the clerk will swear you and place you under oath.

MR. BRAUN: Your Honor, may I raise one preliminary technical matter?

THE COURT: All right.

MR. BRAUN: Neither of the defendants, Broce or Broce Construction Co., has been arraigned with respect to the indictment which was returned last Thursday and it might be appropriate to have them waive at this time the reading of that indictment.

THE COURT: In the case 82-20011-01, this is the first appearance by Mr. Broce and also the construction company, so there has been no arraignment on this charge, the Sherman Antitrust charge, one count, and for the record, then, I take it that the defendants have been furnished copies of this charge, and is it your desire to waive the reading of the indictment as to both defendants?

DEFENDANT BROCE: Yes.

THE COURT: He has already indicated that [16] both on behalf of himself and also the construction company, that as to that case, he wishes to enter a plea of guilty to that charge, is that correct?

MR. TILTON: That's correct, Your Honor.

DEFENDANT BROCE: That's correct.

(Defendant Broce was duly sworn.)

THE COURT: Let's see, do you have written petitions on both cases or just this new one?

MR. CROCKETT: Your Honor, the one that is typed in is based on the older indictment.

THE COURT: I see.

MR. CROCKETT: And what I have done is penned in a statement referring to the new indictment and also inserted the case number on it, the most recent indictment.

THE COURT: Let me just go over this briefly.

In these petitions to enter pleas of guilty, Counts 1 and 2 in the older case, Mr. Broce on behalf of himself and also on behalf of the corporation states in substance that "We agreed to suppress competition for a Meade County project with other contractors. This project was let by the state of Kansas April 25, 1978. Bids were discussed with other contractors in order to conspire to have the project awarded to the Broce Company and that this was done with Mr. Broce's knowledge and [17] consent. A false statement was then submitted on the bid and a payment was sent by mail to the company with Mr. Broce's knowledge and consent." Also states that his acts and the acts of

the company suppressed competition on the project's price and made the contract subject to an artificial price, denying the state and the United States free and open competition on the contract and, further, it states that both on behalf of himself and also the corporation, he is also pleading guilty to the indictment, the one charge in the indictment, in case 82-20011-01, which is the new indictment, wherein competition was suppressed in reference to the Barton County project.

Now, is this correct, Mr. Broce, what I have just read?

DEFENDANT BROCE: Right.

THE COURT: Do we have the government's statement of the facts there?

MR. TILTON: Yes, we do.

(Handed to the Court.)

THE COURT: This applies to both cases, right?

MR. CROCKETT: That's correct, Your Honor.

MR. TILTON: Yes.

THE COURT: Let me just go over it a minute.

[18] Mr. Broce, have you gone over this statement of facts in support of the pleas, it's a 4-page instrument here, have you gone over that with your attorneys?

DEFENDANT BROCE: I guess I have.

THE COURT: Well, I want to be sure you have, and I want to know, are these statements correct here as to what you did and how this all came about?

DEFENDANT BROCE: Well, this Meade County project, to the best of my knowledge, Mr. Carlile came to me and asked me if we would allow him to have the Meade County project, and I told him to talk to my manager, Mr. Gumm, that we—I understood him to say that we were needing work pretty bad and he would like to have the Meade County project, so I guess I inferred that it would be all right with me if it was all right with Mr. Gumm, so

he mentioned let us have that and next month the job in Gray County we would be willing to let you have that, and I told him we would let each county stand on its own as far as my part is concerned, but he would have to talk with my manager, Mr. Gumm, I'm not in there very often and that I don't recall talking to anyone else except Mr. Carlile.

THE COURT: Now, other than that, this statement of facts, you do agree with that, is that correct?

[19] MR. TILTON: Your Honor, Mr. Broce also tells me that he doesn't recall talking to Orville Spray, president of the Venture Corporation. He thinks it was Mr. Gumm that talked to him instead of him.

DEFENDANT BROCE: I'm awful sure I didn't. The only one I remember talking to at all was Mr. Carlile.

THE COURT: Other than these two things, now, that you have just raised, the rest of this is substantially correct, then, is that correct?

DEFENDANT BROCE: Right.

THE COURT: Do we have the plea agreement on file, too? I want that. I haven't seen that, other than what you have told me.

MR. CROCKETT: I might comment for the record, Your Honor, we did have copies attached to the petitions. However, some changes were made this morning and we removed the copies and do intend to attach to what you now have as the originals.

THE COURT: I want the plea agreements attached and in the file and also the statement of facts that were just outlined here.

MR. CROCKETT: That is fine.

THE COURT: For the record, the defendant has signed both on behalf of himself and the corporation [20] these three separate plea agreements.

MR. CROCKETT: That's correct. I might comment for the record, also, Your Honor, that we inadvertently

handed you just a while ago Mr. Gumm's plea agreement as well, and that is the third one you have.

THE COURT: Let me put that to the side.

MR. BRAUN: Your Honor, may we have just a moment?

(Stood informally at ease.)

MR. TILTON: Could we take a short recess for about two or three minutes?

THE COURT: All right.

Let's take about five minutes.

MR. TILTON: That would be fine.

THE COURT: We will be in recess for five minutes.

(Recessed.)

THE COURT: Now, do you have a statement to make, Mr. Tilton?

MR. TILTON: Yes, Your Honor, the defendant Mr. Broce has looked at this statement and he was a little confused as between the Meade and Barton County job and this statement is substantially correct.

DEFENDANT BROCE: Right.

[21] MR. TILTON: Is that correct, Mr. Broce?

DEFENDANT BROCE: Right.

THE COURT: Mr. Broce, for the record, have you ever received any type of mental treatment or anything like that or for any kind of a mental illness?

DEFENDANT BROCE: Never.

THE COURT: Now, you have gone over these matters thoroughly with your attorneys, have you, Mr. Broce?

DEFENDANT BROCE: Yes.

THE COURT: And your decision now to enter pleas of guilty, both on behalf of yourself personally and also on behalf of the corporation, those decisions to enter pleas of guilty, those are your decision and not your attorneys'?

DEFENDANT BROCE: Absolutely my decision.

THE COURT: Mr. Tilton, as one of the defendants' attorneys, do you know of any reason, then, why the Court should not accept these pleas of guilty that have just been indicated?

MR. TILTON: Your Honor, I do not.

THE COURT: The Court is satisfied and finds that the defendant, on behalf of himself and also the corporation in both of these cases, is entering pleas of guilty freely and voluntarily, that he understands [22] the nature of the charges, the rights of the defendants with regard thereto, and also the consequences of these pleas.

The Court further finds that there are factual bases for each of these pleas of guilty. In case 81-20119-01, that is the older case, as to the defendant personally, the Court accepts his pleas of guilty to Counts 1 and 2 of the indictment, and in that same case, the Court also accepts the pleas—plea of guilty of the construction company, the corporation, as to Count 1.

As to the new case, 82-20011-01, the Court is accepting the plea of guilty to the one count on behalf of Mr. Broce personally and also on behalf of the corporation.

A pre-sentence investigation is ordered to be made as to both defendants. Sentencing is set for Monday, March 15, at 10:30 in the morning, and before Mr. Broce leaves, he must talk to the probation people, they will want some information to begin their investigation, and, for the record, the same conditions of release will apply on the new case, that is, 82-20011-01, as apply in the older case, 81-20119-01, and I think that is an O.R. bond, and the Court will set the same amount for this new case and with the same conditions of [23] release, and I do have a bond form and conditions of release which the defendant will need to sign before he leaves today. I'll give those to you, Mr. Tilton.

MR. CROCKETT: Your Honor, as I recall, in that regard, the only special condition of the bond under the first indictment was that the restriction to travel was limited to the continental United States rather than the District of Kansas.

THE COURT: Yes, I think that's right.

THE COURT: Let's take up Mr. Gumm's plea in 81-20119-01.

Mr. Crockett, Mr. Gumm desired to enter a plea of guilty as to Count 1, is that correct?

MR. CROCKETT: Count 1 and 2.

THE COURT: In both counts, okay.

Mr. Gumm, it is your desire now to enter a plea of guilty to both the Sherman Antitrust violation and also the mail fraud violation, Counts 1 and 2 in the indictment, is that correct?

DEFENDANT GUMM: Yes, sir.

THE COURT: Mr. Gumm, we will have to go through very much the same colloquy we went through as you were present here with Mr. Broce, but the Court does want to advise you, of course, that you may maintain [24] your previous plea of not guilty on the two charges in this indictment, and, of course, in the event of a not guilty plea, you are guaranteed certain rights under the Constitution, namely, the right to a speedy and public trial by jury and at that trial and at all stages of the proceedings, you would have the right to the assistance of a lawyer. You would also have the right to see and hear all witnesses that might be called to testify against you, the right to cross-examine those witnesses. You would have the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in your favor. You would also have the right not to be com-

pelled to take the witness stand and testify and possibly incriminate yourself at a trial. If you chose to exercise that right, the jury would be instructed that no inference of guilt could be drawn from your failure to do so, and, further, at any trial, your innocence would be presumed until such time, if ever, as the government came forth with sufficient evidence to establish your guilt to the satisfaction of the Judge or jury beyond a reasonable doubt.

Mr. Gumm, do you understand these rights that are guaranteed to you under the law if you plead not guilty?

[25] DEFENDANT GUMM: I understand, sir.

THE COURT: And do you understand that by entering a plea of guilty that you would be waiving or giving up all of these constitutional rights that I have just explained to you?

DEFENDANT GUMM: I understand.

THE COURT: And do you further realize that by entering pleas of guilty to these two counts that you would be admitting all the facts alleged in these counts, you would be waiving your right to a trial on these charges and, in fact, there would be no further trial of any kind either to the Court or to a jury?

DEFENDANT GUMM: Yes, sir.

THE COURT: You also realize that even though you plead guilty that the Court may still impose the same punishment as if you had pleaded not guilty, stood trial and been convicted by a jury?

DEFENDANT GUMM: Yes, sir.

THE COURT: Now, the maximum punishment for the Sherman Antitrust violation is a fine up to one hundred thousand dollars and a term of imprisonment up to three years. On the mail fraud violation, the maximum punishment is a fine up to one thousand dollars and a term of imprionment up to five years, do you understand that?

[26] DEFENDANT GUMM: Yes, sir.

THE COURT: I take it that these pleas of guilty are the result of plea agreement between the defendant, his attorney, and government counsel, is that correct?

MR. CROCKETT: That's correct, Your Honor.

THE COURT: And has this been reduced to writing?

MR. CROCKETT: It has. That is the plea agreement that we handed to you with Mr. Broce's and the corporation's.

THE COURT: Mr. Gumm, you have gone over this plea agreement, is that correct, with your attorneys?

DEFENDANT GUMM: Yes, sir.

THE COURT: Other than what has been stated now in this plea agreement, has anyone made any sort of promise or inducement to you in order to get you to enter these pleas of guilty?

DEFENDANT GUMM: No, sir, they have not.

THE COURT: Are you telling the Court, then, that you are entering these pleas of guilty freely and voluntarily?

DEFENDANT GUMM: Yes, sir.

THE COURT: And that the only reason you are entering these pleas of guilty is because you are in fact [27] guilty of these charges?

DEFENDANT GUMM: Yes, sir.

THE COURT: You understand that in connection with these proceedings that the Court is going to ask you some questions concerning your participation in these offenses. You will be answering these questions under oath, on the record and in the presence of your attorney, and these answers, if not true, could later be used against you in a prosecution for perjury or false statement.

DEFENDANT GUMM: Yes.

THE COURT: Have you gone over with your attorneys a written petition to enter pleas of guilty?

DEFENDANT GUMM: Yes.

THE COURT: And do you have any questions about any of the matters covered in that petition?

DEFENDANT GUMM: No, sir.

THE COURT: And do you understand that the answers that you are giving to the questions in that petition are being made here in court under oath?

DEFENDANT GUMM: Yes, sir.

THE COURT: You may go ahead and sign it if you have not done so, and then the clerk will swear you.

MR. CROCKETT: Your Honor, I have presented the petition to the Clerk and I would comment for the [28] record that as in Mr. Broce's situation, the plea agreement—plea bargain agreement is not attached to the petition. However, we do intend to so attach it.

THE COURT: I have the original here.

(Defendant Gumm was duly sworn.)

THE COURT: Mr. Gumm, you indicate here as to Counts 1 and 2 that you agreed to suppress competition for a Meade County project with other contractors. This project was let by the state of Kansas April 25, 1978. Bids were discussed with other contractors in order to conspire to have the project awarded to the company that you were secretary of. This was done with your knowledge and consent. A false statement was then submitted on the bid and a payment was sent to the company by mail with your knowledge and consent, and that your acts suppressed competition on the project's price and made the contract subject to an artificial price denying the state and the United States free and open competition on the contract. Now, is that correct?

DEFENDANT GUMM: Yes, sir, basically.

THE COURT: Mr. Crockett, the statement of facts that was applicable to Mr. Broce's plea is also the basis for this plea, is that correct?

MR. CROCKETT: That's correct, Your Honor. And I might state in reference to that, that Mr. Gumm's [26] position is that the statement of facts in support of the pleas is substantially correct. The only statement with which he takes any exception is the second sentence of the first page, reference the statement that the project was a federal aid secondary project. We are not disputing that other than to simply say we didn't know.

THE COURT: You have gone over those statements of facts with your attorney, Mr. Gumm, have you?

DEFENDANT GUMM: Yes.

THE COURT: And you do acknowledge that they are correct, other than this one, you don't know one way or the other?

DEFENDANT GUMM: Yes, substantially correct, yes, sir.

THE COURT: For the record, have you ever had any treatment for any type of mental illness?

DEFENDANT GUMM: No, sir.

THE COURT: Mr. Gumm, you have gone over this matter carefully now with your attorneys, have you, and decided that what you want to do is to enter pleas of guilty to these two counts, is that correct?

DEFENDANT GUMM: Yes, sir.

THE COURT: This decision to enter pleas of guilty, now, this is your decision and not your attorneys'?

[30] DEFENDANT GUMM: That's correct, my decision.

THE COURT: Mr. Crockett, as one of the defendant's attorneys, do you know of any reason, then, why he should not enter pleas of guilty to these two counts?

MR. CROCKETT: I know of none, Your Honor.

THE COURT: The Court is satisfied and finds that the defendant is entering his plea of guilty to Counts 1

and 2 of the indictment freely and voluntarily, that he understands the nature of the charges, his rights in regard thereto, and also the consequences of his pleas. The court further finds that there is a factual basis for his pleas of guilty and that he is mentally competent to enter these pleas of guilty.

His pleas of guilty, then, to Counts 1 and 2 are accepted. He is adjudged guilty of the crimes charged, a presentence investigation is ordered to be made, and sentencing is set for March 15, 1982, at 10:30 in the morning. Likewise, he will need to see the probation office and give them some information before he leaves.

MR. CROCKETT: We will do that, Your Honor. Thank you.

REPORTER'S CERTIFICATE

I hereby certify that the above 30 pages are a true and correct transcript of the proceedings in the above-entitled cause on the date as indicated.

/s/ HAROLD PITTELL

Harold Pittell
Office Reporter
United States District Court
District of Kansas

OFFICIAL VERSION OF THE OFFENSE

The defendants Ray C. Broce and Broce Construction Co., Inc. are in large part responsible for making bid rigging a "way of life" in the highway construction industry. As early as the late 1960's and continuing through the early 1970's, Broce Construction was a member of a highway construction bid rigging conspiracy known as the Big Five. During this period, Ray C. Broce was president of the company. Broce Construction, together with J. H. Shears' Sons, Inc., Reno Construction Company, San Ore Construction Company (now out of business), and Prairie States Construction Co., orchestrated the allocation of much of the highway work let by the State of Kansas. The Big Five's conspiratorial system was to allocate one ton of asphalt work to each non-member highway contractor for each three tons of asphalt work to a Big Five member. By so doing, the Big Five was able to suppress the growth of smaller, possibly more efficient, contractors and to insure each member construction work and profit thereon. If a smaller contractor balked at the 3 to 1 allocation, each member of the Big Five took a turn underbidding that small contractor and subsidizing those low bids with the excess profits realized on the rigged projects, until the small contractor was forced to go out of business or to join the conspiracy. When San Ore exited the industry in about 1973, this conspiracy ended; nevertheless, the contractors continued to set up projects on a job by job basis, with these defendants taking the lead in using their influence and economic power to keep smaller contractors in line.

The large contractors, including Broce Construction, also continued to suppress competition in the industry by pressuring smaller contractors to agree to allow the larger contractors to have the sizable jobs. Should a smaller

contractor refuse to go along with such agreements, the large contractor simply bid so low on the jobs on which the small contractor was qualified to bid, that the small contractor had to take the project at a loss or had to refrain from underbidding the large contractor and thus procure no work. In this manner Broce Construction and Ray C. Broce, the company's principal stockholder, were able to maintain a profitable business without the necessity of lowering their profit margin or otherwise striving to be one of the most efficient Kansas contractors.

The two separate conspiracies giving rise to the Indictment both illustrate the leverage Broce Construction exerted in its position as a large and, at least as perceived by the smaller contractors, powerful contractor.

The Meade County Project

The conspiracy which resulted in Broce Construction Co. being the successful bidder on the Meade County project pitted Ray Broce and Jerry Gumm against James Carlile, a relatively small contractor. The Meade County project was let by the State of Kansas on April 25, 1978. The following bids were submitted on the Meade County project:

1. Broce Construction Company, Inc.
   $1,072,684.15
2. Carlile Asphalt Company, Inc.
   $1,083,120.65
3. Prairie States Construction Co.
   $1,100,167.90
4. Siebert Sand Company, Inc.
   $1,110,221.00
5. Popejoy Construction Company, Inc.
   $1,110,788.81

The State's cost estimate was $1,016,836.00. Based on a comparison of low bids on projects which were bid com-

petitively to low bids on projects which were rigged, we have found that competitive low bids average about 90-95% of the State's cost estimate. On that basis the economic loss to the State on this project in western Kansas, was about $75,000.

Ray Broce and Jerry Gumm attended the April 25, 1978 letting, arriving the night before at the Ramada Inn, Topeka, Kansas. That night James Carlile, vice president of Carlile Asphalt Co., Inc., went to Gumm's motel room to tell Gumm that Carlile was interested in the Meade County project. Gumm told Carlile that Broce Construction wanted the project. Carlile replied that he would bid it competitively, but Gumm told Carlile that there was no way Carlile would get the Meade County project because Broce Construction would not let Carlile have it. Carlile responded that he intended to bid competitively on the Gray County project to be let in May, 1978, in which Broce Construction was also interested.

Around midnight, following the initial discussion between Carlile and Gumm, Ray Broce contacted Edward Berry, telling Berry that the Meade County project which Broce was supposed to get was not coming through. Broce proposed taking one half of the Pawnee-Edwards County projects, but Michael Gallagher objected.

In the early morning hours of April 25, 1978, Ray Broce talked to James Carlile in the Broce Construction Company suite of rooms to persuade Carlile to get off the Meade County project. Jerry Gumm was present during portions of the conversation. Ray Broce remained adamant about Broce Construction having the Meade County project and refused to discuss the upcoming Gray County project. Broce finally got Carlile to agree that Broce Construction would be the low bidder on the Meade County project and Carlile Asphalt the low bidder on the Seward

County project, also let on April 25, 1978. Each agreed to submit complementary bids for the other.

At approximately 5:00 or 6:00 a.m. that morning, Carlile and Jerry Gumm exchanged numbers to bid above when each submitted a complementary bid. Following this conversation, James Carlile believed that he had an agreement with Ray Broce and Gerald Gumm not to bid below Broce Construction on the Meade County project and that Broce Construction would not bid below Carlile Asphalt on the Seward County project. Carlile had to raise his intended bid on the Meade County project to get above the number given to him by Gerald Gumm.

Jerry Gumm also had separate conversations regarding the Meade County project with Donald Popejoy, president of Popejoy Construction Co., Inc., and Ronald Siebert, president of Siebert Sand Co., Inc., on the night before the letting. In his conversation with Popejoy, Gumm asked for a complementary bid, and Popejoy told Gumm the figure that Popejoy intended to submit. This figure was already higher than the amount Broce Construction intended to bid. Popejoy agreed not to cut his bid below the amount Gumm said Broce Construction would bid.

Siebert contacted Gumm to ask for a complementary bid on the Cheyenne County project, also let on April 25, 1978, which Siebert wanted. Gumm agreed to do so and asked for a complementary bid from Siebert on the Meade County project, to which Siebert agreed. Gumm and Siebert then exchanged numbers to bid above on the respective projects.

Broce Construction Co. submitted its bid proposal on the Meade County project signed by Gerald Gumm, which contained a representation that there had been no collusion in the submission of the bids. As a result of the

award, Broce Construction performed the work on the Meade County project, and submitted vouchers for payment to the Kansas Department of Transportation. Payment was made by State checks (warrants) sent by mail from the Kansas Department of Transportation to Broce Construction Co. in Dodge City, Kansas. Ray Broce and Gerald Gumm were aware of the State's custom and practice of mailing such warrants.

The Barton County Project

In order to successfully set up the Barton County project, Ray Broce offered financial inducement to a smaller contractor to secure that contractor's agreement not to bid competitively.

The Barton County project was let by the State of Kansas on July 17, 1979; and the following bids were received:

1. Broce Construction Company, Inc.
   $1,639,968.55
2. Venture Corporation
   $1,659,936.26
3. Siebert Sand Company, Inc.
   $1,737,447.75

The State's cost estimate for the project was $1,635,164.45. Based on a comparision of low bids submitted on projects which were bid competitively to low bids on projects which were rigged, we estimate the economic loss to the State was approximately $150,000.

On the night prior to the letting, Ray Broce approached Orville Spray, Jr., president of Venture Corporation, and asked Spray to get off the Barton County project to allow Broce Construction to be low bidder. Spray refused and told Broce that he was interested in the project. Ray Broce then offered Spray his choice of $75,000 or a subcontract

for the widening and the shoulder work on the project if Spray would submit a complementary bid. Spray agreed to let Broce Construction have the project. Sometime later that night, Gerald Gumm provided Spray with a number to bid above.

Approximately one week after the July 17, 1979 letting, Spray met with Broce and Gumm in Dodge City, Kansas. Gumm had the authority to carry out the deal Broce had made with Spray. Gumm arranged with Spray for Spray to invoice Broce Constructon to sell sand at a high price and to rent equipment that Broce Construction would not use. Together, the invoices would result in payments totaling $75,000 from Broce Construction to Spray.

The other bidder on the project, Ronald Siebert, president of Siebert Sand Co., does concede that his bid was a complementary bid although he does not have a specific recollection of the circumstances.

Jerry Gumm also approached James Carlile on the night before the letting to ask whether Carlile Asphalt was interested in the Barton County project. Carlile told him no.

Broce Construction Co. submitted its bid proposal signed by Gerald Gumm which contained a representation that there had been no collusion in the preparation of the bid.

Culpability and Cooperation

Broce Construction Company and its president Ray Broce have been involved in bid rigging more extensively than most other Kansas contractors. By admission of its officer, Gerald Gumm, Broce Construction Company has participated in collusive bidding on twenty-six highway construction projects during the period from May, 1977 until as recently as July, 1980. Eight projects, including the two which are the subjects of these Indictments, were set up by Ray Broce or Gerald Gumm or both for Broce

Construction to be the successful bidder. On the remaining projects, Broce Contruction submitted complementary bids for other Kansas contractors.

Ray Broce arranged to pay off another contractor to stay off a project in July, 1980, after Broce was aware of bid rigging investigations and convictions in other states. The Ford County project, worth over $3.5 million, was let on July 17, 1980, and was of great interest to Broce. Ray Broce made the original agreement with Thomas Callaghan, then area manager of Prairie Construction Co., on the night before the letting. Broce offered to let Prairie States subcontract the concrete work for about $400,000 if Prairie States would not bid competitively on the project. Callaghan agreed to take the money in the form of a subcontract and not to bid the Ford County job. Broce then told Jerry Gumm to work out the details of the agreement with Callaghan.* Later, a $120,000 payment from Broce Construction Co., Inc. to Prairie States was arranged in lieu of the subcontract.

On February 8, 1982, Ray C. Broce pleaded guilty to the Sherman Act count and the Mail Fraud count of the Meade County Indictment and pleaded guilty to a second Indictment charging a Sherman Act violation (the Barton County Indictment). Broce Construction Co., Inc. pleaded guilty on that date to the Sherman Act count of each Indictment. Both pleas were entered pursuant to plea agreements between the United States and Ray C. Broce and Broce Construction Co., Inc. Ray Broce was interviewed by the staff on February 9 and 10, 1982 in the presence of his attorneys and FBI Special Agent Jerry Wiley. Broce did not recall specific details, with a few exceptions, regarding most projects. He frequently replied

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* *See* The Official Version of the Offense for Gerald R. Gumm for his role in the Ford County project conspiracy.

that we would have to ask Jerry. While we believe Broce has been candid, his cooperation provides only some corroboration of information previously received and does not substantially advance the investigation in Kansas. Broce and his company, as well as Gumm, have agreed in the plea agreements to cooperate with respect to information they have regarding Oklahoma, where Broce Construction also bids a substantial amount of work. Broce has been able to provide some additional details concerning bid rigging in Oklahoma and because the investigation is in its formative stages has been of more assistance to the Government than he has been with respect to the Kansas investigation.

Ray Broce blames Gerald Gumm and his attorneys for their refusal to accept an earlier offer from the Government on a more attractive plea arrangement which would have resulted in earlier and more valuable cooperation. The attached statement from Steve Smith, vice president of Smith Sand Co., is inconsistent with that position. It appears that the position of Broce and Gumm was an expectation that if no one talked, the investigation would "blow over" as had some previous investigations. The possible bribe of a federal prosecutor also appeared to be a reasonable option to defendants Broce and Gumm.

Mr. Braun

I

Sometime early last year when I learned that I was going to be supeoned to Kansas City to the grand jury I went to Dodge City Kansas to see Jerry Gumm. He wasn't there that day but I talked to Allen Bradley a little bit about what a grand jury was and what to expect when I went to K.C.. He also gave me the name of their lawyer in Topeka so, I could have my lawyer call him to see what was going on.

II

S.S. A few weeks later I went back to Dodge City to see if Jerry Gumm was there. He said it probably would blow over but if it didn't Broce probably would help this Mr Braun the Federal Prosecutor get started in private practice. He said something about $100,000 should help him get started in private practice rather nicely.

III

My lawyer & me went to K.C. to the grand jury the first time; but early that Morning we met Broces lawyer for coffee at our Motel. He told Ward Loyd (my lawyer) He said that his clients were taking the 5th Amendment and would rather go to jail before they would testify against Broce Const. Co. He said far as he knew everybody that went to the grand jury had taken the 5th Amendment.

II

Also when I met with Jerry Gumm he mentioned that they (Broce) were going to get their trial moved from K.C. to Wichita Federal Court because the Judge their wasn't as tough as Judge O Connor in K.C. He said O Connor is

used to dealing with the mafia and gives stiff sentences. Also in our conversation he said that Broce told him not to worry about anything because he had $1,000,000 set back to pay their fine. Thats about all I can remember.

Signed /s/ STEVE SMITH
Steve Smith

December 17, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

BROCE CONSTRUCTION CO., INC.,
RAY C. BROCE AND GERALD R. GUMM, DEFENDANTS

No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO.,
DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

March 15, 1982

Appearances:

HON. EARL E. O'CONNOR,
Chief Judge

For the Plaintiff: MR. RICHARD J. BRAUN
U.S. Department of Justice,
Room 2634,
Everett M. Dirksen Building,
Chicago, Illinois 60604.

For the Defendants: MR. ROBERT TILTON AND
MR. KENNETH F. CROCKETT,
1324 Topeka Boulevard
Topeka, Kansas 66612.

Harold Pittell,
Official Reporter

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[2] BE IT REMEMBERED, on the 15th day of March, 1982, the above matter coming on for hearing before the Honorable Earl E. O'Connor, Chief Judge of the United States District Court for the District of Kansas, and the parties appearing in person and/or by counsel, the following proceedings were had:

[3] THE COURT: United States of America versus Broce Construction Co., Inc., Ray C. Broce, and Gerald R. Gumm, and 82-20011-01, United States versus Ray C. Broce and Broce Construction Co., Inc. Let's take up the two cases as to the defendant Broce Construction and Ray C. Broce.

On February 8, 1982, in case 81-20119-01, the defendant Broce Construction Co. entered a plea of guilty to the antitrust charge, and likewise, in 82-20011-01, the construction company entered a plea of guilty there to the one charge, which is an antitrust charge.

Now, as to Mr. Broce, 81-20119-01, he entered a plea of guilty to Counts 1 and 2, Count 1 being the antitrust charge and Count 2 being the mail fraud charge, and then in the later case, 82-20011-01, Mr. Broce entered a plea of guilty to the one count which was an antitrust charge.

A pre-sentence investigation was ordered, the same has been made as to each of the defendants.

Counsel, have you and the defendant had an opportunity to go over the pre-sentence reports as to both defendants in these cases?

MR. TILTON: I have. Did you have a chance to go over the pre-sentence report, Mr. Broce? I don't [4] think, Judge, he had a chance to actually sit down and read it, but he had the opportunity when he was here, but he had to leave because his plane was going to take off. I have discussed with him the contents of it.

THE COURT: Well, he has a right to read it if he wants to.

MR. TILTON: Do you want to read the pre-sentence report? You remember, I told you about what was in it.

DEFENDANT BROCE: Yes.

MR. TILTON: Do you want to read it, or do you want to waive that reading?

DEFENDANT BROCE: I guess I'll waive it.

THE COURT: Do you have any comments that you want to make on the pre-sentence reports or anything to say for and on behalf of the defendants?

MR. TILTON: Your Honor, the only thing that I have to say on behalf of the corporation, we would request that any fine that is payable, that the defendant corporation be allowed to make that in three installments. The government is not objecting to that and, of course, I understand that is up to the Court. It is our hope that this corporation can continue in business. They employ two hundred employees in the summer and they have many employees that have been with them [5] as many as forty years, and hopefully, the corporation will be allowed to continue in business so that these people do not lose their jobs.

We have entered into an agreement to cooperate with the government, and I think they will agree that we have been cooperating with them in their case in Oklahoma. We

have given them information that's been useful to them there, information they didn't have.

As to the defendant Ray Broce, the Court, of course, is aware that he is nearly 80 years old and he has no prior record. The Court has received many letters from people in the community asking the Court to consider his reputation and the things that he has done in that community. We feel that this is a serious matter, of course, and we would hope that the Court would consider his age and his past good works that he has done in his community. We would request any sentence that he might receive, that he be allowed to serve it at a minimum security institution, hopefully in Big Springs, Texas. He does have bad health. He has a circulation problem that strikes him about twelve times a year, makes him bedfast, and we hope that the Court will consider his age, his health, and the effect that a sentence will have on a man this age.

We would request that if the Court deems [6] a sentence appropriate that the defendant have two weeks to get his affairs in order.

I think Your Honor does have information in the file that although what this corporation has done is certainly wrong, in their road building they have striven to a degree of excellence. They are the only company in the United States that's been awarded the award for having the best built asphalt roads in the country. They won this award three consecutive years and their subsidiary in Oklahoma has done that, and certainly what they have done is wrong, but it shows they have attempted to provide to the government a better than ordinary road when they did build one, and Mr. Broce is very proud of that. He is very proud of his employees and hopes that whatever happens that he can continue to provide them employment.

THE COURT: Do you have any dispute with what the government has included in the pre-sentence report about

the official version of the offense, and particularly—I think it's the culpability and the cooperation under that phase of the statement of the offense.

MR. TILTON: Well, my client, Judge, certainly doesn't agree about the big five and those type of statements. Most of these defendants in this case have been in business a lot less longer than him.[7] If he had been trying to keep them out of business, they wouldn't—probably wouldn't have been in business. He certainly doesn't agree to that. There is a statement in there by Mr. Smith that Mr. Broce absolutely says is not true, he knew nothing about. That is our position on those things. No question he had been in the business longer than anybody probably in the state. He is one of the first people to build roads.

THE COURT: Do you have anything further?

MR. TILTON: That is all I have, Your Honor.

THE COURT: Mr. Broce, do you have anything that you wish to say on your own behalf?

DEFENDANT BROCE: Really, I don't know what it is. I have done the best I know how up to now.

THE COURT: Does the government wish to address the Court in regard to punishment?

MR. BRAUN: Very briefly, Your Honor.

With respect to just one issue there is something I would like to say. There is a suggestion in some of the letters which have been included in the pre-sentence report Mr. Broce and his company are a victim of circumstances. I think with respect to some of the smaller contractors that may very well be true. I think in the case of Mr. Broce and Broce Construction Company,[8] Mr. Broce played a very large part in creating the circumstances with which smaller contractors were faced. With respect to Mr. Broce, the Court has his net worth available and can see that Mr. Broce didn't need to engage in these types of activities either to feed his family or to adequately care for his company or his employees.

I have nothing further.

THE COURT: Mr. Tilton, do you have anything further to say?

MR. TILTON: No, Your Honor, I don't. I realize that Mr. Broce does have a substantial net worth, but I can tell you that most of this money was not made in the road building business. He has made some very shrewd investments. I think a majority of his net worth is derived from wholly owned subsidiary companies.

THE COURT: Is there any legal reason, then, why sentence should not be pronounced in both of these cases?

MR. TILTON: None known to the defendant, Your Honor.

THE COURT: The Court has reviewed the extensive pre-sentence reports in both of these cases. This one here, for example, are all letters that have been written on your behalf, Mr. Broce, by people—[9] friends and colleagues of yours and, of course, you rightfully can be very proud of those.

The Court has noted from this report the fact that apparently this is a self-made man who through hard work and perseverance and the insistence upon quality work being done has risen to really the top of the industry in the state, and along with that, apparently he has been a—loyal to his employees, a community leader, generous in his work, and also the providing of financial help to individuals and community projects.

Specifically, as to the offenses in question, here, though, it would appear that this defendant and this company have played a significant role in making bid rigging a way of life in the highway construction business in this state. In fact, it would appear from looking at many of these other bid rigging cases in connection with this one, that while many of the small contractors have been more

or less fighting or scraping for the crumbs that some of the big ones, including the defendant, have been more or less busy cutting up the big load, and according to the government, these activities by this company have been extensive, so it is against this type of conduct that in the Court's opinion the antitrust laws are especially directed.

[10] In determining the appropriate punishment in this case, the Court has considered and is taking into consideration all of the letters that have been sent by friends and acquaintances and business associates of Mr. Broce. The Court is also taking into account the fact that he has entered pleas of guilty and has saved the government the expense of trial, and, of course, the Court is also taking into consideration his age and health.

Even with these mitigating factors, which are being fully considered, the Court is of the opinion that justice requires a sentence of incarceration.

As to each of the cases, so far as the corporation is concerned, in the first case, 81-20119-01, the corporation is fined the sum of $750,000.

In case 82-20011-02, the corporation is fined the sum of $750,000.

The total fines, then are $1,500,000, and the same are to be paid as follows: One-third by December 31, 1982, one-third by December 31, 1983, one-third by December 31, 1984.

As to Mr. Broce personally, in 81-20119-02, the antitrust charge, the defendant is fined the sum of $50,000. It is also the judgment, order and sentence of the Court that the defendant be committed to the [11] custody of the Attorney General or his authorized representative for imprisonment for a period of two years, and he shall become eligible for parole at such time as the Parole Commission shall determine under 4205(b)(2) of Title 18 of the United States Code.

On the mail fraud charge, he is fined the sum of $1,000, and a similar two-year sentence is imposed and that is to be concurrent. The sentences of imprisonment are to be concurrent.

In 82-20011-02, the defendant is fined the sum of $50,000, and he is also sentenced to a similar term of imprisonment. All sentences of imprisonment are to run concurrently.

The total fine against Mr. Broce personally is $101,000. The fines must be paid prior to the defendant's release from incarceration. In other words, they are committed fines.

The Court recommends that this sentence be served at a minimum security institution and you have requested Big Springs. It is my understanding that they cannot take him because of overcrowding, and if that be true, the Court would recommend the federal institution at Fort Worth, Texas, which is a minimum security institution, but we will leave it that it will be first Big Springs. If they cannot take him, then it would be[12] Fort Worth.

The Court will permit voluntary surrender and a stay of execution two weeks from today and he would surrender during business hours.

I think you have one count to dismiss in this case.

MR. BRAUN: At this time, Your Honor, the government would move to dismiss the mail fraud count which remains in 20119 against the defendant Broce Construction Company.

THE COURT: That count, then, is dismissed.

Mr. Tilton, now, before Mr. Broce leaves today, he will have to sign some papers for this direct surrender, so be sure and do not get away until you do that.

MR. TILTON: All right, Your Honor.

THE COURT: Now, Mr. Gumm.

This defendant was before the Court on the same day, would be February 8, 1982, entered a plea of guilty to Counts 1 and 2 of the indictment, and that is in 81-20119-01.

A pre-sentence investigation has been made as to Mr. Gumm, and counsel and the defendant, have you had an opportunity to go over the pre-sentence report in this case?

[13] DEFENDANT GUMM: Yes, yes, sir.

THE COURT: Mr. Tilton, do you have any comments to make on the report or anything to say for and on behalf of the defendant?

MR. TILTON: Your Honor, I would hope that the Court would consider this man's good record up until this time. It is in the pre-sentence report, of course, but he has served his country. He has been honorably discharged. You have many letters from people in his community asking the Court for consideration. He is the manager of this business with two hundred employees. It would be hoped that any sentence he might receive that he be allowed to serve that after Mr. Broce has served his sentence so this business could continue and these people would not be without work. The goverment I know in their pre-sentence report has felt that he has not cooperated, but he did eventually plead guilty and he has tried to cooperate to the best of his ability. He has suffered from a loss to his reputation. He has a wife and three children, one child still at home. He is active in his church and he probably has had a misguided loyalty to his employer, but he has benefited little from all of these activities, and we hope that the Court will consider these facts in passing sentence.

[14] THE COURT: Mr. Gumm, do you have anything that you would like to say in your own behalf or anything to present to the Court in the way of mitigation of punishment?

DEFENDANT GUMM: No, sir. I have an attorney to do that.

THE COURT: Does the government wish to address the Court in regard to punishment?

MR. BRAUN: I do, Your Honor.

THE COURT: All right.

MR. BRAUN: Two things I would like to bring to the Court's attention with respect to this defendant. First, early in the investigtion, we contacted Mr. Tilton and Mr. Tilton contacted us and we made a very specific offer to Mr. Gumm in the way of a plea agreement to obtain his cooperation. That offer the defendant at that time turned down, and there was some indication on his part that he did not have an interest in cooperating in the investigation.

The second fact I would like to bring to the Court's attention is a statement in the pre-sentence report, the defendant's version that this defendant did not realize that what he was doing in the way of setting up jobs, obtaining complementary bids, was wrong. The record shows that Mr. Gumm signed affidavits of [15] non-collusion as part of bidding proposals which he submitted. He worked for the Highway Department and knew what kind of competition the state of Kansas was looking for, and I note that he was the valedictorian of his high school class. It seems to me to be difficult to conceive of a person with that type of experience not believing that what he did was wrong, not knowing that what he did as he read those affidavits of non-collusion and signed them with the statement that a signature on a false one was a separate violation of law, not realizing that what he was doing violated the law. Those two matters I would bring to the Court's attention. Thank you.

THE COURT: Mr. Tilton, do you have any response?

MR. TILTON: Your Honor, if this defendant thought he had done anything wrong, he certainly understands

that he has. He has entered a plea of guilty and I realize that complementary bidding was long practiced, many years, in this state, and I think some of these people didn't really realize the seriousness and the ramifications of what it was. I'm not going to stand here and tell the Court he didn't know what he was doing was wrong. I'm sure he did, but he's here today, he knows he has been wrong, he has pled guilty, he has [16] tried to cooperate with the government, and I don't think the Court will ever see him here again.

THE COURT: Mr. Tilton, is there any legal reason, then, why sentence should not now be imposed?

MR. TILTON: None known to the defendant, Your Honor.

THE COURT: Well, the Court, of course, has gone over the numerous letters that have been received in this case as to this defendant. So far as culpability is concerned, of course, everything indicates that you were the person who really carried out the details of the collusive bidding practices of Broce Construction Company.

On Count 1, it is the judgment, order and sentence of the Court that, first, the defendant be fined the sum of $10,000, and he be committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of one year and one day.

On Count 2, no fine is imposed, the same sentence, one year and one day, is imposed, and these sentences are ordered to run concurrently.

The fine shall be paid before release from any incarceration, so it is a committed fine.

The Court recommends that this sentence be [17] served at a minimum security institution. The defendant will be permitted to voluntarily surrender to the institution designated, and in accordance with the plea agreement, the Court will grant a stay until the defendant Mr. Broce

is release from incarceration, and then within ten days the defendant then is to stand committed.

Is there any dismissal in this—there isn't in this case?

MR. BRAUN: No, there is not.

MR. TILTON: Your Honor, will the defendant be allowed to go to Big Springs if it's available at that time?

THE COURT: Well, I think we better just wait until that time rolls around because it is our understanding that Big Springs and Maxwell are both overcrowded to where they cannot take any more for a while, so we will just wait.

MR. TILTON: Your Honor, would it be possible to get copies of these letters that people wrote to these defendants so they could thank them?

THE COURT: We will give you the addresses, but I tell you, there are some letters in here that I am not sure the people would want you to have. I think that works both ways.

[18] MR. TILTON: Okay.

THE COURT: We will give you the addresses if you want them.

MR. TILTON: Thank you.

REPORTER'S CERTIFICATE

I hereby certify that the above 18 pages are a true and correct transcript of the proceedings in the above-entitled cause on the date as indicated.

/s/ HAROLD PITTELL

Harold Pittell
Office Reporter
United States District Court
District of Kansas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 81-20119-01-02

UNITED STATES OF AMERICA, PLAINTIFF

-vs-

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

No. 82-20011-01-02

UNITED STATES OF AMERICA, PLAINTIFF

-vs-

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

AFFIDAVIT

Kenneth F. Crockett, of lawful age, being first duly sworn and upon his oath deposes and states:

1. That he is a regularly practicing attorney in the State of Kansas and is admitted to practice before this Court.

2. That he and Robert Tilton represented defendants Broce Construction Co., Inc. and Ray C. Broce in the above-captioned cases including the plea hearing on February 8, 1982, and the sentencing hearing on March 15, 1982.

3. That originally, defendants were charged in Case No. 81-20119 with one count of conspiracy to violate 15 U.S.C. § 1 and one count of mail fraud.

4. It first came to my attention that the government was considering presentment of an additional indictment against defendants by a letter dated January 11, 1982,

from Richard J. Braun, a true and correct copy of which is attached hereto and made a part hereof by reference.

5. On January 18, 1982, Robert Tilton and I had a meeting in Topeka with Richard J. Braun and Robert Allen, attorneys for the government. The purpose of the meeting was to discuss plea negotiations. We were advised by Braun that if defendants plead, they would have to plead to two indictments each charging a conspiracy to violate 15 U.S.C. § 1 or they would go to trial on the first indictment (Case No. 81-20119) and then face one trial after the other on separate indictments for each highway project which the government believed were rigged and for which the government could obtain indictments. Defendants were given no other choice.

6. On January 27, 1982, the plea agreement was orally finalized. The Barton County project, Project No. KRL29-2(26) was substituted for the Ford County project referred to in Braun's January 11, 1982, letter.

7. Defendants were indicted in Case No. 82-20011 on February 4, 1982, but did not receive a copy of the indictment until just before the plea hearing on February 8, 1982.

8. At no time were there any discussions with defendants or the government concerning double jeopardy issues resulting from the second indictment. The question of double jeopardy was not considered by defendants prior to the pleas entered on February 8, 1982.

9. Further affiant saith naught.

/s/ KENNETH F. CROCKETT
Kenneth F. Crockett

Subscribed and sworn to before me this 22nd day of March, 1983.

/s/ PATRICIA GARDNER
Notary Public

My Commission Expires:

7-31-84

U.S. Department of Justice
Antitrust Division
Midwest Office

219 South Dearborn Street *312/353-7530*
Chicago, Illnois 60604

60-206-143 JAN 11, 1981

Kenneth F. Crockett, Esq.
Tilton, Dillon, Beck & Crockett
1324 Topeka Blvd.
Topeka, Kansas 66612

Re: United States v. Broce Construction Co., et al.

Dear Mr. Crockett:

Enclosed are proposed trial exhibits 21 and 22 being the registration cards for Ronald Siebert and Donald Popejoy for the April 25, 1978 letting. We also wish to advise you that we may call as witnesses three additional persons:

(1) Thomas Callagan
Gilbert Western Corp.
Salt Lake City, Utah

(2) David Adams
Adams Ranch
Forgan, Oklahoma

(3) Orville Spray, Jr.
Venture Corp.
Great Bend, Kansas

You are also advised that we may offer as a subsequent similar act testimony related to Ford County project 50-29 TQF 050-2(23) let by the State of Kansas on July 17, 1980. You should also be advised that we intend to present to the grand jury a proposed indictment concerning the above project naming each of the defendants as proposed defendants in that Indictment.

Within the next week we will send you a copy of a proposed Stipulation with respect to the issues of corporate status, bidding responsibilities, officers of the corporation and interstate commerce.

We would appreciate having your witness list by January 15, 1982.

Sincerely

/s/ RICHARD J. BRAUN
Richard J. Braun
Attorney, Midwest Office
Antitrust Division

Enclosure

Supreme Court of the United States

No. 87-1190

UNITED STATES, PETITIONERS

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

ORDER ALLOWING CERTIORARI. Filed February 29, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60808